Supreme Court, U.S.
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No. 97-804

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, a public entity; and MARY GROGAN, an individual; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC GAS & ELECTRIC COMPANY; PACIFIC GAS TRANSMISSION COMPANY and ALBERTA & SOUTHERN GAS COMPANY, LTD.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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RULE 29.6 STATEMENT

Pacific Gas and Electric Company ("PG&E") discloses that its parent company is Pacific Gas and Electric Corporation. Pacific Gas Transmission Company's ("PGT") parent company is Pacific Gas Transmission Corporation. Alberta and Southern Gas Co., Ltd.'s ("A&S") parent company is PG&E. PG&E's only nonwholly owned subsidiary is Standard Pacific Gas Line, Inc. PGT and A&S have no nonwholly owned subsidiaries.

Pacific Gas and Electric Company ("PG&E"), Pacific Gas Transmission Company ("PGT") and Alberta and Southern Gas Co., Ltd. ("A&S") (collectively, "PG&E" or "Respondents") respond to the Brief *Amicus Curiae* of States in Support of Petitioners ("*Amicus* Brief") as follows:

1. Like Petitioners, *Amici* brief an issue that was neither tendered to nor decided by the Court of Appeals. *See Amicus* Brief at 16 (summarizing question presented as "whether a State may evaluate the prudence of a retailer's decision to buy a particular quantity of gas from one federally-approved source as opposed to another"). No issues regarding the proper scope of state prudence review were presented below. Rather, the Court of Appeals decided that, pursuant to *Keogh*, federal regulatory review and approval of PG&E's gas import prices and volumes required dismissal of private antitrust claims brought by ratepayers. *See* Respondents' Brief in Opposition ("R. Br.") at 1-2, 10; *County of Stanislaus v. PG&E*, 114 F.3d 858 (9th Cir. 1997), Appendix A to Petition For Certiorari ("App.") at 4a. The fact that the *Amicus* Brief does not cite a single antitrust case and, instead, confines itself to federal-state preemption cases confirms that the proffered "conflict" is illusory. *See* R. Br. at 13-14.

2. *Amici* erroneously equate state regulatory prudence review with judicial antitrust review in arguing that the Court of Appeals' decision may tie the hands of state regulators. *See, e.g., Amicus* Brief at 6 (in dismissing antitrust case, Ninth Circuit "may also have abrogated the State's authority"); 15 (decision allows utilities to evade review under antitrust laws "and arguably under state regulatory laws."). The two subjects are analytically distinct. State prudence review focuses not on whether a regulated local utility harmed competition (a utility, after all, historically was a lawful monopolist), but on whether it made reasonable choices among energy supplies available at or within the State's borders. Since prudence review usually gives rise to filed rate and state action

defenses, a utility's purchasing choices typically are not subject to antitrust scrutiny.[1] An antitrust action like this one thus implicates different concerns than a state prudence review case. It is not the proper vehicle for adjudicating federal preemption limits on state regulatory jurisdiction, particularly as no meaningful record regarding such issues was developed in the District Court or Court of Appeals.[2]

3. *Amici* ask this Court to resolve a purported conflict between dicta. While *amici* admit that this Court's acknowledgment of the *Nantahala* (or *Pike County*) exception to the filed rate doctrine is dicta, they nonetheless ask the Court to determine what consequences the Ninth Circuit's discussion of this dicta might have for state regulatory jurisdiction prospectively. *Amicus* Brief at 5; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986). Respondents submit that the potential impact of a discussion of dicta — which itself is dicta — on hypothetical future controversies provides no basis on which to grant certiorari.[3]

4. In any event, *Amici* incorrectly assert that the decision below deprives state regulators of preexisting jurisdiction over a utility's

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1. Although the Court of Appeals reached only the *Keogh* issue, the District Court dismissed this case both on filed rate and state action grounds. R. Br. at 9-10.

2. *Amici* complain that the Court of Appeals refused to consider regulatory materials regarding the jurisdictional issues pressed in their brief — materials never even tendered to the District Court. *Amicus* Brief at 3 n.3. The Ninth Circuit declined to consider such materials precisely because they were irrelevant to the *antitrust* issues involved here.

3. *Amici* implicitly acknowledge that their articulated concerns are hypothetical at this point. *See, e.g., Amicus* Brief at 1 (decision "could seriously compromise" state authority), 18 (decision "jeopardizes" state authority and "place[s] at serious risk the vital interests of States").

purchasing decisions in foreign commerce. The Natural Gas Act expressly limits state regulatory jurisdiction to reviewing a local utility's purchasing choices made *at or within a State's border*; state jurisdiction does not extend across the international border into Canada. 15 U.S.C. § 717(b), (c) (Hinshaw Amendment preserves state jurisdiction only over "natural gas received by [a utility] . . . within or at the boundary of a State"). Energy imports into the United States raise issues of purely federal concern and therefore are subject to exclusive federal jurisdiction. *TransCanada Pipelines, Ltd. v. FERC*, 878 F.2d 401, 407-08 (D.C. Cir. 1989) (in international commerce, federal approval of an import subsumes a finding of prudence that may not be challenged by downstream agency review). None of *amici's* regulatory authorities even considers, let alone acknowledges, the supposed jurisdiction of a state commission to review the prudence of supply choices made in foreign commerce.[4] *See also* R. Br. at 16-17 n.18.

5. This litigation concerned a retrospective antitrust challenge to import arrangements that were approved by ERA in 1984 and were terminated by PG&E in 1993. Since then, the competitive landscape has been profoundly altered by the Energy Policy Act of 1992 and the deregulation of the natural gas market. Because emerging competitive forces in the natural gas and electric services industries will fundamentally alter the roles of local utilities and their regulation by state commissions in the years ahead, the concerns expressed by *Amici* are transitory. Any collateral impact the Court of Appeals' decision may have had on a historic regulatory issue has no prospective significance, making this a case whose time has passed.

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4. To the contrary, the cited cases recognize that, as required under the Natural Gas Act, state authority is limited to reviewing utility purchasing choices among supply alternatives available *at or within the State border* — although such choices may involve comparing imported Canadian gas with gas from other United States supply basins or from intrastate sources.

CONCLUSION

For the foregoing reasons and the reasons set forth in Respondents' Brief in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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